TABLE OF CONTENTS

Page

Jurisdiction 4

Questions Presented 6

1. Alleged Incorporation by Implication 6

2. Public Policy 11

3. The Louisiana Direct Action Statute Applies to Ferran's Indemnity 16

Conclusion 21

DECISIONS

Bisso v. Inland Waterways Corporation,
349 U.S. 85 ..... 12, 14, 15, 16

Boston Metals Company v. SS Winding Gulf,
349 U.S. 122 12

California Tanker Company v. Todd Shipyards Corporation, 339 Fed.2d 426 (C.A. 2, 1964) 12

Erie R. Co. v. Tompkins,
304 U.S. 64, 82 L.Ed. 1188 (1938) 11, 12, 13, 21

Herd & Company v. Krawill,
359 U.S. 297, 3 L.Ed. 820, 79 D.Ct. 766 (1959) 20

Maryland Casualty Company v. Cushing,
347 U.S. 409, 89 L.Ed. 806, 74 S.Ct. 608 (1954) 20

Musmeci v. American Automobile Insurance Company, 146 So.2d 496 (4 C La. 1962) 20

Sun Oil v. Dalzell Towing Co.,
287 U.S. 294 15

Sun Oil Company v. Dalzell Towing Co.,
278 U.S. 271, 77 L.Ed. 311, 53 S.Ct. 135 (1932) 14

DECISIONS (Continued)

Page

United States v. Nelson,
349 U.S. 129 12

STATUTES

28 USCA, Rules of the Supreme Court of the United States, Rule 19 ..... 2, 4, 5, 6

28 USCA 1254 (1) 4

Louisiana Civil Code, Article 11 13

Louisiana Civil Code, Article 2082 17

Louisiana Civil Code, Article 2083 17

Louisiana Civil Code, Article 2091 ..... 17, 18

Louisiana Civil Code, Article 2093 ..... 17, 18

Louisiana Civil Code, Article 2098 ..... 17, 18

Louisiana Civil Code, Article 2107 ..... 17, 18

Louisiana Direct Action Statute, La. R.S. 22:655 16

TEXTBOOKS

Benedict on Admiralty, 6th Edition,
Volume 1, paragraph 71, page 148 13

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

No. 218

ALCOA STEAMSHIP COMPANY, INC.,
Petitioner,

versus

CHARLES FERRAN & COMPANY, INC., GLENS FALLS INDEMNITY COMPANY, UNDERWRITERS AT LLOYDS LONDON, ANDREW WEIR INSURANCE CO., LTD., FINE ART & GENERAL INSURANCE CO., LTD., NATIONAL PROVINCIAL INSURANCE CO., LTD., ORION INSURANCE COMPANY, LTD., ENGLISH & AMERICAN INSURANCE CO., LTD. "M", AND ECONOMIC INSURANCE COMPANY, LTD., "M" a/c,
Respondents.

BRIEF IN BEHALF OF EXCESS UNDERWRITERS IN OPPOSITION TO PETITION FOR CERTIORARI BY ALCOA STEAMSHIP COMPANY, INC.

NOW INTO COURT come Charles Ferran & Company, Inc., Glens Falls Indemnity Company, Underwriters at Lloyds London, Andrew Weir Insurance Co., Ltd., Fine Art & General Insurance Co., Ltd., National Provincial Insurance Co., Ltd., Orion Insurance Company, Ltd., English & American Insurance Co., Ltd. "M", and Economic Insurance Company, Ltd., "M"

a/c, Respondents, and file this, their opposition to the petition for certiorari by Alcoa Steamship Company, Inc.

This suit claims damages to property only, for no personal injuries are involved. We submit that this Court lacks jurisdiction under Rule 19, and that on the facts found by the District Court and affirmed by the Court of Appeal, all factual issues are final. Finally, the alleged errors of law are without merit.

It is very significant to observe that in the petitioner's Statement of the Case there is no mention whatever made of the fact that Alcoa has actually been allowed a potential recovery, up to an amount not to exceed $300,000.00, but that ultimate recovery may be far less, depending upon the outcome of the findings yet to be handed down by the Special Master to whom the proration of damages was referred. It is very possible that Alcoa will take nothing. The red letter clause by its very terms comes into play only after the damages have reached $300,000.00, the ultimate determination of which is impossible to predict until the case shall have been finally resolved.

The basic fact here is that there is no application of the red letter clause protection below the very substantial amount of $300,000.00. The sole and only question before this Court then is whether or not the excess underwriters, in the event of a final judgment for more than $300,000.00 can be protected by contractual limitation. Our contention is in the affirmative as the District and Circuit Courts held.

The District Court found, and the Court of Appeal affirmed, that the red letter clause was an integral part of shipbuilding contracts in the trade, and of this contract in particular. There is no difference in law between the fact finding reached by the courts below, and a situation where a similar stipulation is expressly provided for in a written contract under seal, because the District Court found as a fact that the clause was an integral part of the agreement.

The Circuit Court found that there is nothing inconsistent with the legal conclusion reached in upholding the red letter clause as against any alleged overriding federal admiralty policy. The petition is devoid of any meritorious attack on this actual conclusion, for the petition is also devoid of any authorities which would support the contention that there has been a violation of the general admiralty law in upholding a $300,000.00 limit stipulated by contract, as both District and Circuit Courts found and held. Further, the petition does not touch on the fact that the arrangement involving the red letter clause with its $300,000.00 limitation, was long existent as part of an understanding with Alcoa for Ferran to handle all of the repairs to the Corsair when she was in New Orleans. (See page 32 of the petition in citing the Circuit Court's decision.) There was no monopoly because Alcoa had the freedom to change repairmen at pleasure.

We submit that under the general maritime law the parties are free to contract in any manner, and may stipulate with regard to any provisions, provided they do not violate public policy. There is no public policy

involved here which is violated by this very substantial $300,000.00 limitation. We submit that an examination of the authorities set forth in the petition discloses that they simply do not present any public policy applicable to these facts. On the contrary the red letter clause has been recognized as valid in decisions by other courts.

I. JURISDICTION

Petitioner's sole contention as to the jurisdiction of this Court is stated on page 2, as follows:

> "The jurisdiction of this Court is invoked under 28 USCA 1254(1)."

There is no further explanation with regard to the guidelines set forth under Rule 19 of this Court which reads:

> "CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI.
>
> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore

determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

It is, therefore, rather difficult to ascertain the precise claim to jurisdiction without petitioner so specifying. Obviously, this is not a petition to review a state court decision and, therefore, Section (a) of Rule 19 is inapplicable. But whether petitioner contends that the Court of Appeal has rendered a decision in conflict with another on the same matter, or the case involves an important state or territorial question in a way to conflict with applicable state or territorial law, or the decision is an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way to conflict with applicable decisions of this Court, or has so far

departed from the accepted and usual course of judicial proceedings, is far from clear.

Nonetheless three attacks have been alleged in the petition, namely, inclusion of the red letter clauses by implication, refusal to follow public policy considerations by this Court, and the interpretation of the Louisiana Direct Action Statute as to applicability to underwriters. We submit that none of these three questions falls within Rule 19, and that, accordingly, there is a lack of compliance with Rule 19.

II. THE QUESTIONS PRESENTED

1. *Alleged Incorporation by Implication*

What the petitioner means by the expression "incorporated in that agreement by implication" is difficult to comprehend. It can hardly be contended that the red letter clause was implied, when it actually appeared in red ink on the invoice similar to those invoices repeatedly used on previous repair contracts between these two parties in the following terms:

> *"We contract only upon the following terms, applicable to every contract;* in the case of a vessel we have a lien upon the vessel for our bills; all time contracts are subject, without responsibility on our part, to delay in case of strike, labor difficulties, fire or causes beyond our control; or liability in case of defective workmanship or material is limited strictly to the proper replacement thereof.

"Furthermore, we undertake to perform work on vessels and provide berth, wharfage, towage and other services and facilities only upon condition that we shall not be liable in respect to any one vessel, directly or indirectly in contract, tort or otherwise, to its owners, charterers or underwriters for any injury to such vessel, its cargo, equipment or movable stores, or for any consequences thereof, unless such injury is caused by our negligence or the negligence of our employees and *in no event shall our aggregate liability to all such parties in interest for damage sustained by them, as a result of such injury, exceed the sum of $300,000.00.*

"In connection with the *accident and/or indemnity* and/or *insurance clauses,* if any, contained in your specifications, relating to liability for personal injuries, please note that we do not agree to same, in so far as they undertake to impose any liability or any obligation to take out or maintain insurance beyond the liabilities or the obligations to insure imposed upon us by law." (Emphasis supplied)

In addition to its previous use between the parties, it was stipulated between counsel as follows (R 202):

"MR. BAGLEY: I'm sorry — I don't want to interrupt Mr. Sarpy, but I think we are willing to stipulate this practice was carried out: There was a practice which had been pre-

existing that the repairs were made on oral agreement generally; that there was no documents exchanged between the parties prior to the time of the repairs; and that although the specifications or the re-write specifications sent by Ferran, which was the first document received by ALCOA, did not have the red letter clause, and when the billing was finally received from Ferran and on the invoices on their jobs and on prior similar jobs, the bills would be received on letterheads having this so-called red letter clause, which would be similar to all of these contracts.

"MR. SARPY: We will stipulate to all of this, except one thing, with regard to the written documents that may have been exchanged between the parties prior to the repairs on this particular job. Otherwise, the stipulation is all right.

"MR. BAGLEY: We also would like understood that this stipulation includes the fact that there was no discussion of or agreement on the red letter clause between anyone in Ferran's office and anyone in ALCOA's office.

"MR. SARPY: One way or the other — we will admit that. And that since that time and up to now the red letter clause is still being used in ship repair contracts in which ALCOA participates, in the port of New Orleans.

"MR. BAGLEY: Now, in ship repair contracts by Ferran and or by others?

"MR. SARPY: Between ALCOA and any ship repair concern, whether it be Ferran or anybody else, such as Todd, Boland Machine —

"MR. BAGLEY: We will stipulate to this extent, Mr. Sarpy, that we know that the practice of the repair yards generally is to send out something in the nature of an invoice or other document which contains the red letter clause, and that ALCOA will in the course of its operations receive and has continued to receive from repair contractors documents bearing this red letter clause.

"MR. SARPY: Up to the preesnt time?

"MR. BAGLEY: Up to the present time.

"MR. SARPY: And further, that ALCOA had made no objections to the red letter clause in this case —

"MR. BAGLEY: Well, the position of ALCOA in this case, I think has been fairly clearly set out by us that we do not believe that the red letter clause became a part of this contract; that this contract was an oral agreement, which did not incorporate by any expressed terms prior to the fire the red letter clause.

"MR. SARPY: I understand but you made no objection, no one connected with ALCOA did anything to indicate their intentions to exclude the red letter clause in this particular case.

"THE COURT: Neither to include or to exclude."

The District Court consequently found the following fact among others:

"The Court finds as a matter of fact that the red letter clause was common in the trade and had been used by Ferran on many prior occasions in billing Alcoa for repair work and had been used on other Alcoa repair jobs subsequent to the incident. * * *"

Therefore, the District Court found, and the Court of Appeal affirmed, that the evidence fully established the clause as an integral part of the contract and accordingly we submit that it is every bit as binding as if it had been incorporated in a formal document under seal.

How the petitioner can contend in light of the foregoing that the clause was included by implication, is rather difficult to understand, in addition to the agreement for it was expressly agreed by stipulation. There is no provision in the law (for, if there were able counsel for petitioner would have cited it) to the effect that a shipbuilding contract must be in writing. It is

also fundamental that in ship repair contracts the law has never required any particular stipulations to be reduced to writing, for anything that is valid can be stipulated by the parties, whether orally or in writing. It is then only a question of proof which the District Court and Circuit Court must resolve. Here, the District Court found, and the Circuit Court affirmed, that the agreement for red letter clause did exist. There can be no manifest error in this factual determination.

Therefore, we respectfully urge that the "inclusion by implication" attack is threadbare, for there has been an inclusion by well-buttressed actuality, not implication. And even if by implication, such is a factual finding and is final in the absence of manifest error.

2. *Public Policy*

We fully agree that the contract in question was a maritime contract, and that any recognized principles of the General Maritime Law, as well as the Acts of Congress pursuant to the grant of admiralty jurisdiction in the Constitution, must prevail over any precepts of law in any other field. But petitioner has cited no authorities in support of any theory which demonstrates that principles of maritime law do exclude this red letter clause from this particular contract. Likewise, it has not advanced any reference to any Act of Congress on the subject of public policy outlawing such a contract. We must, therefore, go dehors the General Maritime Law and since 1938 under Justice Brandeis' historic opinion in *Erie R. Co. v.*

Tompkins, 304 U.S. 64, 82 L.Ed. 1188 we must look to the state law.

Petitioner's references to decisions are scant. In *California Tanker Company v. Todd Shipyards Corporation,* 339 Fed.2d 426 (C.A. 2, 1964) the Court observed that with respect to a red letter clause the party had "contrived the reproduction of it in such fine print as to be readable only by the use of a magnifying glass." This record at bar is devoid of any evidence that a magnifying glass was required for the reading of this invoice. Indeed, a simple perusal of the clause is quite readable by a person with ordinary vision and without the use of spectacles or a magnifying glass. The *California* case involved only an interpretation which is not an issue here. Moreover, the Courts found in the case at bar that the red letter clause was general in the trade, and was particularly well known between these contracting parties, between whom the clause had been used repeatedly in previous repair contracts, and as the stipulation bears out. The citation is no help.

On page 5 of the petition are cited *Bisso v. Inland Waterways Corporation,* 349 U.S. 85; *Boston Metals Company v. SS Winding Gulf,* 349 U.S. 122, and *United States v. Nelson,* 349 U.S. 129. Not one of these decisions in anywise discusses the red letter clause. *Bisso* involved a full, absolute and complete defense against all liability for negligence of a tug boat operator in a towage agreement. The following two decisions on the same day were on the very same principie, and were all decided contemporaneously.

It is fundamental in the law of contracts that the parties are free to stipulate anything which does not offend public policy, and this rule avails whether the contract be construed according to the maritime law or the state law. No federal or state statute has been cited to the contrary.

And here the maritime law is silent on the subject, so admiralty must, therefore, apply equitable principles and revert to the law of the states, see Benedict on Admiralty, 6th Edition, Volume 1, paragraph 71, page 148, *Erie R. Co. v. Tompkins,* supra.

The contract here was made in Louisiana and executed in Louisiana and therefore, in the absence of general maritime law on the subject, the provisions of the Louisiana law apply.

Article 11 of the Louisiana Civil Code provides:

> "All things that are not forbidden by law may legally become the subject of or the motive for contracts.
>
> "Individuals cannot by their conventions, derogate from the force of laws made for the preservation of public order or good morals.
>
> "But in all cases in which it is not expressly or impliedly prohibited, they can renounce what the law has established in their favor, when the renunciation does not affect the rights

of others, and is not contrary to the public good."

In light of the foregoing the *Bisso* decision, which seems to be the only ground for the principal attack, has no valid application because here there is no contract of common carriage.

It is to be observed that whereas the petition cites the *Bisso* case, it carefully avoids *Sun Oil v. Dalzell Towing Co.*, 287 U.S. 294, which the District Court had cited as authority and which the Supreme Court distinguished in *Bisso*. See 349 U.S. at p. 96.

The *Bisso* decision has no application to this case for several reasons. First, in *Bisso* there was a towage contract in which all negligence of the tower had been precluded in its entirety. Because it was a towage contract the recognized rule against exoneration from liability by common carriers for the tower's own negligence was applied, and the clause was declared illegal by the Supreme Court of the United States. Another wide difference is that in Bisso the limitation was absolute, whereas here it is remote and relative, to the extent that the liability of Ferran for its own negligence was left wide open up to the sum of $300,000.00. This simply meant that Ferran was to insure to $300,000.00 and Alcoa assumed the excess. The cost of the repairs including insurance was affected accordingly.

Sun Oil Company v. Dalzell Towing Company, 278 U.S. 271, 77 L.Ed. 311, 53 Supreme Court 135 (1932), involved a pilotage situation which contained a stipula-

tion against recovery by the vessel owner resulting from the pilot's negligence, and this stipulation was upheld by the Supreme Court of the United States. In the subsequent *Bisso* decision the *Sun Oil* case was clearly distinguished on that ground. In *Sun Oil* the Supreme Court upheld the clause whereby a tug owner furnishing tugs to take a vessel through certain waters contracted with the owner of the vessel that when the tug captain boarded the vessel using her own power, such captain became the servant of the vessel owner and accordingly the tugs and their owners would not be liable for any resulting damage. The Court pointed out that respondent was not a common carrier or bailee, see 287 U.S. 294, and concluded that the parties were on equal footing and at arm's length;

> "There is no rule of public policy which derives effect and their expresed intention, but on the contrary as the matter lies within the range of permissible agreement, *the highest public policy is found in the enforcement of the contract which was actually made.*
>
> * * *
>
> "It would be unconceivable for petitioner upon concurrence of a mishap to repudiate the agreement upon which it obtained the service." (Emphasis supplied)

Hence, unless the *Bisso* decision can be stretched very thinly to the factual situation in this case, it clearly has no application. This matter involves a ship

repair contract and is not in anywise related to a contract of carriage, and certainly not to a contract of common carriage or bailment. The *Bisso* decision is, therefore, a very narrow holding applicable only to towage contracts and contracts of common carriage and has no effect here.

Even assuming but not admitting that *Bisso* does apply to ship repair contracts, the nature of the red letter clause here differs very widely from *Bisso*, because here there is no application of the absolute exoneration from liability below the sum of $300,000.00, for it is only in excess of that amount that the exoneration applies. Petitioner has cited no decisions and no authorities that would outlaw this limitation, which we submit was made at arm's length, under reasonable conditions, and with a realistic fair outlook on the rights of both parties, particularly with regard to insurance rates. We therefore submit that the complaint of the red letter clause violating public policy is entirely without merit.

3. *The Louisiana Direct Action Statute Applies to Ferran's Indemnity.*

The District Court opinion is unanswerable on the legal right of the vessel's underwriters to invoke the red letter clause as a defense, which they did.

Louisiana's direct action statute (La. Rev. Stat. 22:655) reads in part:

"The injured person or his or her survivors or

> heirs hereinabove referred to at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured or insurer is domiciled, and said action may be brought against the insurer alone or against *both the insured and insurer jointly and in solido,* at the domicile of either or their principal place of business in Louisiana." (Emphasis Added)

It is glaring that the statute gives a direct action which *"may be brought against the insurer alone or against the insured and insurer 'jointly and in solido'* * * *."

The law is clear as to what "jointly and in solido" means. Louisiana Civil Code Articles 2082, 2083, 2091, 2093, 2098 and 2107 read as follow:

> "Art. 2082. When several persons obligate themselves to the obligee by the terms in solido, or use any other expressions, which clearly show that they intend that each one shall be separately bound to perform the whole of the obligation, it is called an obligation in solido on the part of the obligors."

> "Art. 2083. In like manner, when the obligor contracts expressly, or by using the technical words in solido, that he will give to either one, or to all of several obligees the right of en-

forcing the obligation against him, *it creates an obligation in solido in favor of the obligees.*"

"Art. 2091. There is an obligation in solido on the part of the debtors, when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them, exonerates the others toward the creditor."

"Art. 2093. An obligation in solido is not presumed; it must be expressly stipulated.

This rule ceases to prevail only in cases where an obligation in solido takes place of right by virtue of some provisions of the law."

"Art. 2098. *A codebtor in solido, being sued by the creditor, may plead all the exceptions resulting from the nature of the obligation,* and all such as are personal to himself, as well as such as are common to all the codebtors.

He can not plead such exceptions *as are merely personal to some of the other codebtors.*"

"Art. 2107. There are many contracts in which the obligation is declared by law to be in solido, without any express stipulation to that effect; these will be found in the different chapters which treat of such contracts." (Emphasis supplied)

Applying the statutory and code language to the situation, there is no proper denial that the underwriters are liable "jointly and in solido" with Ferran.

As the District Court with complete logic stated in its second opinion, 251 F.Supp. 831,

> "The defense (red letter clause) asserted here by Ferran stems from the repair contract which established the relative rights and obligations between Ferran and Alcoa."

and furthermore

> "This limitation of liability constitutes a defense resulting from the nature of the obligation within the plain meaning of Article 2098."

Nothing could be more concise and logical.

Now against this what does Alcoa contend? They contend that they sue the underwriters by virtue of the breach of Ferran's agreement with Alcoa, but seek to preclude the underwriters from the protection of the very same agreement, thus seeking a one way street, a unilateral benefit, a shooting from behind a blind, which is illogical, unfair and contrary to law. Alcoa invokes the favorable portions of the Louisiana statute but would deny the appellees the portions which are unfavorable to Alcoa. For support of this advocated arbitrary result they cite several decisions which we shall analyze.

Maryland Casualty Company v. Cushing (pp 5, 11) involved the Federal Maritime limitation statute which the instant case does not. The question was whether the Federal Law was in conflict with and hence controlled over the state statute, and on which the Court was equally divided. The case was remanded and continued until the completion of the limitation proceeding. The case has no effect in the instant case where no federal statute is involved, but on the contrary the state law clearly favors Ferran and its underwriters.

Then they cite *Herd & Company v. Krawill* (pp 6, 8, 12) to show that statutory and contractual limitations are to be strictly construed. Under the strictest interpretation the insurer here is liable "jointly in solido" and as such entitled to the very same benefit and defense of the clear contractual limitation language. *Herd,* therefore, has no application.

Musmeci v. American Automobile Insurance Company (pp 11) affords Alcoa no solace, for it involved an attempted defense of sovereign immunity. It was not a defense stemming from the nature of the contract. Likewise it has no application.

Here the defense of the contractual limitation not only arises from the nature of the contract but from its very literal provisions. Alcoa has not cited one Louisiana case where the defense arose from the contractual provisions and was denied. The Louisiana Civil Code Articles are clear and unambiguous. The contractual limitation is clear and unambiguous. There is no personal limitation such as coverture and

sovereign immunity. Alcoa's argument is threadbare for it is simply unsupported by legal authority.

We have demonstrated that the Civil Code grants to Alcoa's underwriters the defense set forth literally in the contract itself. There is nothing strictly personal in this defense. Consistent with all Civil Code Articles and decisions under them, the District Court was eminently correct in granting the contractual defense in the red letter clause to the excess underwriters, and the court of appeals affirmed.

III. CONCLUSION

Alcoa is bound by its own arm's length bargain and must accept the bad with the good.

There is no "severely imbalanced hand" as the District Court pointed out. From these facts monopoly cannot be inferred. Alcoa bears very heavy burden of proving that this reasonably qualified limitation in excess of $300,000.00 is invalid. In this it has failed. Under both Louisiana law and general maritime law the clause is valid. On the direct action statute, State interpretative decisions must be recognized by the Federal Courts under *Erie v. Tompkins,* supra.

We recapitulate, first, the petition does not set forth requisite jurisdictional statement under Rule 19 of this Court. Secondly, on the merits, the three contentions are meritless because a) the clause is essentially a part of the contract, having been found to constitute a valid provision by the District and Circuit Courts,

b) there is no showing of any public policy violation, and c) the State statute protects Ferran and also its underwriters with full vigor.

The petition should be dismissed.

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The undersigned proctor for respondents hereby certifies that copies of the above and foregoing Brief have been served on all proctors of record.

New Orleans, Louisiana, July ____, 1968.